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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANGEL BALVERDE, Defendant and Appellant.	C051451 (Super. Ct. No. SF093894A)

A jury convicted defendant Jose Angel Balverde of four counts of assault with a firearm upon a peace officer (Pen. Code, § 245, subd. (d)(1) -- counts 1 through 4), unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a) -- count 5), receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a) -- count 6), possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a) -- count 8), two counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c) -- counts 10 & 12), and assault with a firearm (Pen. Code, § 245, subd. (a)(2) -- count 11). The jury found true allegations that defendant discharged a firearm (Pen. Code, § 12022.53, subd. (c)) on counts 1 through 4 and 10; personally used a

firearm (Pen. Code, § 12022.53, subd. (b)) on counts 1 through 4, 10, and 12; and personally used a firearm (Pen. Code, § 12022.5) on count 11. Defendant was sentenced to state prison for 46 years eight months, with 376 days of custody credit and 56 days of conduct credit.[1]

On appeal, defendant contends (1) his convictions for assaulting the peace officers are not supported by sufficient evidence of his present ability to inflict harm on them, (2) his count 12 robbery conviction is not supported by sufficient evidence of his identity as the robber, (3) his count 6 conviction of receiving a stolen vehicle must be reversed because he was convicted in count 5 of taking the same vehicle, and (4) he is entitled to two additional days of presentence custody credit. The Attorney General concedes the last two points. We shall modify the presentence credits and remand for resentencing on count 5.

FACTS

Theft of Pickup Truck on November 7, 2004

On the morning of November 7, 2004, James Brookes's white 2002 Chevrolet pickup truck was stolen from his driveway. He had left the engine running while he reentered his house to retrieve his wallet. Videotape from a neighbor's security

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[1] The aggregate term of imprisonment consists of the six-year midterm plus 20 years for firearm discharge on count 1, one-third those amounts on count 2, one year plus six years eight months for firearm discharge on count 10, and one year plus three years four months for firearm use on count 12.

camera showed the truck speeding away from Brookes's home. The tape also showed a van similar to a Chevrolet Astro, with a front left fender a different color from the rest of the van, driving down the street moments before the theft and then returning and driving away directly in front of Brookes's truck.

A van with a front left fender a different color from the rest of the van was photographed outside the home of the mother-in-law of codefendant Louis Votino.[2] Three weeks before the truck theft, the van had been sold to a person with a name nearly identical to that of Votino's wife.

Robbery of Marigold Shell Station on November 8, 2004

The morning after the truck theft, Tami Nguyen was working alone at the Marigold Shell station. A man entered the store, pointed a rifle at Nguyen's chest, and demanded money. Nguyen opened the cash register and gave the man all of the cash, a bit more than $200. The man then left and climbed into the passenger side of a white truck that was being driven by another person.

Nguyen testified that the robber wore a sweatshirt with a red hood and a red and white mask covering his face from his nose down to the mid-neck. Underneath the hood was another cap, "[p]robably a baseball cap." Nguyen believed that the robber was wearing white gloves. She estimated that the rifle was two feet long. Nguyen heard the robber's voice and estimated he was

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[2] Aaron Lee Woods and Louis Votino were codefendants at trial. Neither is a party to this appeal.

20 to 30 years old. He was heavy set and a “couple” of inches taller than Nguyen, who is five feet one inch tall. At trial, Nguyen was not able to identify defendant as the perpetrator but indicated that he was similar to the robber in height and weight.

Robbery of Valero Station on November 9, 2004

The morning after the Marigold Shell station robbery, Rowena Caras was working as a cashier at the West Lane Valero station. A chunky, muscular Mexican man, approximately five feet seven or eight inches tall, entered the store wearing a red bandana on his face, a baseball cap, a dark-colored sweater with a white stripe on the side, an orange vest, blue jeans, white gloves, and white tennis shoes. He pointed a shotgun at Caras and demanded money. The man reached into the cash register, removed a tray from the drawer containing approximately $81, left the store, and entered the passenger side of a white truck driven by another person. Caras testified that defendant was similar to the robber in height and weight.

Another Valero employee observed the robbery, got into his truck, and chased the robbers. During the chase, a gun was pointed out the passenger side window and shots were fired.

The Chase, Shootout, and Capture of Defendants

On the afternoon of the Valero station robbery, investigating detectives observed a white truck that matched the description of the truck used in the Shell and Valero station robberies. The truck had three occupants. The detectives followed the truck and called for marked patrol cars to assist.

Uniformed Stockton Police Officers Thomas Walters and Paul Huff attempted to stop the white truck by activating the lights and siren of their marked patrol car. The truck drove off and a high speed chase ensued.

Officers Walters and Huff remained approximately one to five car lengths behind the truck. Officers Darren Baldwin and James Schreiber followed in another police vehicle one to four car lengths behind Walters and Huff. During this time, Walters heard a pop or bang. He then saw a person leaning out of the truck's passenger window holding a rifle. He saw a muzzle flash, heard another bang, and realized that the passenger was shooting at them. Walters and Huff heard "metallic" or "tinkling" sounds of objects hitting the front passenger side of the patrol car. Walters estimated that, at the time of this second shot, he and Huff were four or five car lengths behind the truck. However, Huff estimated that they were one and one-half car lengths behind the truck throughout the time that shots were being fired.

The driver of the truck tried to make a turn at approximately 70 miles per hour. The truck went out of control, collided with a telephone pole, and stopped. Officer Baldwin pulled up and parked his patrol car to the left of Officer Huff's patrol car. The person on the passenger side of the truck climbed out and returned to the truck several times. He then walked toward Officer Walters holding a "pump-type" shotgun with one hand on the trigger and the other on the pump. Walters fired two shots, and the person turned and ran away.

Officer Schreiber saw three people leave the truck. The first person carried what appeared to be a rifle muzzle or shotgun muzzle and soon disappeared from Schreiber's view. The second person ran, and Schreiber fired a shot at him. The third person carried what appeared to be a rifle or shotgun in his hand. When he turned toward the officers with the object at waist level, Schreiber fired shots at him.

Officer Baldwin saw the right passenger and the middle passenger leave the truck and saw one of them hold the barrel of a gun in the direction of the police. The officer then fired three shots.

Officers searched the area and found defendant in the rear yard of a residence. He had a gunshot wound to his left shoulder. When asked about any weapons, defendant responded that he had left it by the truck. He explained that after being shot he had dropped a 12-gauge sawed-off shotgun near the truck the police had been chasing. Defendant also said, "I'm sorry."

At the time of his arrest, defendant was wearing, among other things, a red and white bandana. He also was wearing "a black like sweatshirt-type, like a jogger-type shirt with stripes, white stripes down the side; some blue jeans; and red and white tennis shoes." In his wallet were four keys that appeared to be the ones James Brookes had left in his truck at the time it was stolen.

A loaded 12-gauge shotgun was found in a grassy area adjacent to the truck. The shotgun was operable, and at least

one of the expended shotgun shells found at the scene had been fired from that weapon.

The live shells found in the shotgun were number six shot. One number six shotgun shell contains 225 pellets, each of which is approximately .11 inch in diameter. The criminalist was unable to provide an opinion on whether the shotgun, if loaded with number six shot, would break the window of a patrol car if fired from a distance of one and one-half car lengths.

Following the incident, Officer Walters had quickly examined his patrol car for damage in the nature of a "large bullet hole of some sort," but he had not seen "anything obvious." He had not been looking for damage from shotgun pellets.

At trial, Officer Walters was shown photographs of several divots and scratches on the front of his police car. Walters opined that one of the divots was consistent with damage from the type of ammunition found in the shotgun.

A police detective examined the patrol car and found pellet marks on the right front grill and fender area near where Officer Walters had been seated.

DISCUSSION

I

Defendant contends his convictions on counts 1 through 4 are not supported by sufficient evidence that he had the present ability to inflict harm on the persons of the pursuing officers. Specifically, he claims the shotgun "shots did not constitute an assault on the officers, because the shotgun was loaded with

bird shot, which is not capable of penetrating a vehicle." We are not persuaded.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387 (*Carpenter*), quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560].)

Assault with a firearm on a peace officer is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of a peace officer using a firearm. (Pen. Code, §§ 240, 245, subd. (d)(1).) Assault requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery), and with knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury. (*People v. Williams* (2001) 26 Cal.4th 779, 782; *People v. Miceli* (2002) 104 Cal.App.4th 256, 269.)

Defendant does not dispute that he willfully fired his shotgun at the four pursuing peace officers. He nevertheless claims the evidence of present ability to inflict violent injury

was insufficient because "the shotgun was loaded with bird shot, which is not capable of penetrating a vehicle." The claim fails because its premise, that bird shot is incapable of penetrating a vehicle, finds no support on this record.

The criminalist was asked whether the shotgun, if filled with ammunition consisting of number six bird shot, would be capable of breaking a patrol car windshield if fired from a distance of one and a half car lengths. She answered, "I couldn't tell you." No other expert testimony was offered on the point.

Nor was there evidence that the windshield had, in fact, withstood a direct impact at close range from defendant's shotgun. There was evidence that the front fender, front grill and front hood of one patrol car had sustained divots and scratches. But there was no evidence that the windshield had sustained any similar impacts. Nor was there evidence that the windshield was made of material as strong as the parts that had been impacted. Although there was evidence that the shotgun blasts had missed their mark, there was no evidence that defendant lacked the *present ability* to fire shots directly at the windshields of the pursuing vehicles. (§ 240; see *People v. Valdez* (1985) 175 Cal.App.3d 103, 111 (*Valdez*) ["ability" refers to what a given individual has the capacity to do in contrast with those who lack this quality].)

Finally, the claimed inability of bird shot to penetrate a windshield is not a "fact" within the jurors' common experience. (See Evid. Code, § 801, subd. (a).) Absent expert testimony or

evidence that the windshields had been struck but not penetrated, the predicate fact of defendant's argument was not proven at trial. His convictions on counts 1 through 4 are supported by substantial evidence. (*Carpenter*, *supra*, 15 Cal.4th at p. 387.)

In any event, even if the bird shot could not penetrate the windshield when fired from such a distance, defendant's act of shooting the gun at pursuing peace officers surely constituted assault with a firearm. The loaded shotgun provided defendant with the present ability to inflict violent injury on the peace officers, and his shooting the gun at the pursuing officers certainly constituted an attempt to inflict such injury on them. This satisfies the elements of assault with a firearm, regardless of whether the pellets were capable of penetrating the windshield. Indeed, the act was a classic example of the crime. (*Valdez*, *supra*, 175 Cal.App.3d at pp. 108-112.)

II

Defendant contends his count 12 conviction is not supported by sufficient evidence of his identity as the robber of the Marigold Shell station. He argues the testimony of victim Nguyen and the security videotape were insufficient to establish his identity as the perpetrator of the crime. We conclude the evidence was sufficient.

Nguyen was not able to identify defendant at trial as the perpetrator of the robbery. Nor was she able to identify him in a photographic lineup some time after the robbery. However, she

testified that defendant was similar to the robber in height and weight.

Nguyen testified that the bandana recovered from defendant at the time of his arrest was "probably" the one worn by the person who robbed her. She conceded on cross-examination that she did not "know" for sure. When Nguyen was asked whether there was any doubt in her mind "that the bandanna that was worn was red and white," she responded, "Maybe."

Nguyen testified that the "49er's" baseball cap that was found near the shotgun dropped by defendant was similar to the cap worn by the person who robbed her. Nguyen suggested on cross-examination that she remembered seeing a red cap, not the white- or gray-billed cap she was shown at trial. But the videotape from the security camera shows the robber wearing a cap with a white or gray bill, not a red bill.[3]

Nguyen testified that the .22-caliber rifle that had been found wedged between the truck seats was similar to the one used to rob her. She had previously indicated that the gun used in the robbery was similar to the sawed-off shotgun, not the rifle; but she corrected her testimony after refreshing her recollection with the preliminary hearing transcript. In any

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[3] The videotape was received in evidence at trial and is deemed part of the appellate record. (Cal. Rules of Court, rule 8.320(e).) Following the completion of briefing, we ordered the tape transmitted to this court. We construe the Attorney General's assertion that the videotape "is not included in the record before this Court" to mean that the tape had not previously been transmitted.

event, the gun visible on the videotape appears to be a rifle rather than a sawed-off shotgun. The video image supports Nguyen's estimate that the rifle was two feet long.

Nguyen testified that the robber fled out the door and into the passenger side of a white truck. The robber's truck looked "different" than Brookes's truck, because Nguyen had not seen the two black trim lines that were visible in photographs of the latter. She remembered the truck being "completely white with no black." Except for the black lines, the truck in the photographs was "similar" to the robber's truck.

Nguyen did not recall whether the truck tires were "black or some other color." When asked why she did not notice the truck's tires, she explained that she "didn't really take a good look at" the truck. When next asked whether she was looking at the truck to see whether it had black trim, Nguyen answered, "No."

Thus, reasonable jurors could find that the robber was similar to defendant in height and weight, the robber wore the red bandanna worn by defendant when he was arrested, the robber wore a white- or grey-billed cap similar to the one found near defendant's shotgun, the robber used a .22-caliber rifle identical or similar to the one found in Brookes's stolen truck, and Nguyen did not recall the truck's black trim because she was not looking at the truck to see whether it was so adorned.

Moreover, defendant acknowledges his identity as the person who fired the shotgun at the officers from the passenger side of the white truck. (See part I, *ante*, at pp. 8-9.) Earlier that

morning, a Valero station employee observed shots being fired from the passenger side of the white truck involved in that robbery. The victim of the Valero robbery stated that the robber was similar to defendant in height and weight. Reasonable jurors could conclude that defendant was the robber of the Valero station.

The robber of the Marigold Shell station was similar to the Valero station robber in height and weight. Both robbers wore white gloves. Both reached into the cash registers. Both fled on the passenger side of a white truck. The robberies were one day apart.

From all of this evidence, reasonable jurors could conclude that defendant was the robber of the Marigold Shell station. His count 12 conviction is supported by substantial evidence. (*Carpenter*, *supra*, 15 Cal.4th at p. 387.)

III

Defendant contends, and the Attorney General concedes, he was improperly convicted of *both* taking a vehicle (Veh. Code, § 10851, subd. (a)) in count 5 *and* receiving the same stolen vehicle (Pen. Code, § 496d, subd. (a)) in count 6. We accept the People's concession.[4]

A defendant convicted under Vehicle Code section 10851, subdivision (a) of unlawfully *taking* a vehicle with the

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[4] Defendant received a concurrent term of two years on count 6. Sentence on count 5 was stayed pursuant to Penal Code section 654.

requisite intent has suffered a theft conviction and may not also be convicted of receiving the same vehicle as stolen property. (*People v. Garza* (2005) 35 Cal.4th 866, 871.) However, a conviction under section 10851, subdivision (a) for posttheft *driving* is not a theft conviction and does not preclude a conviction for receiving the same vehicle as stolen property. (*Ibid*.)

The amended information alleged that defendant and codefendant Votino "did willfully and unlawfully drive and take" the truck. However, in lieu of the information, the jury was instructed with a summary of the charges that described count 5 as "Theft of a truck on Nov. 9 [*sic*], 2004." Moreover, defendant's verdict form on count 5 describes the Vehicle Code section 10851 offense as "TAKE VEHICLE WITHOUT CONSENT." Finally, the trial court stayed sentence for count 5 pursuant to Penal Code section 654, further suggesting that defendant's conviction is based on the same act as the count 6 receiving.[5]

The Attorney General asks us to reverse *both* counts 5 and 6, allow the People to retry both counts, and direct the trial

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[5] There was no evidence that defendant drove the truck after it was stolen. Rather, the evidence suggests he was a passenger and the perpetrator of two robberies and four assaults on peace officers. But reasonable jurors could deduce that those assaults aided and abetted the codefendant's posttheft driving of the stolen truck. Thus, there was *evidence* from which defendant could have been convicted of posttheft driving. However, the jury was not given an instruction such as CALJIC No. 17.04, which would have precluded multiple convictions for the single act of theft.

court to reinstate the conviction on count 5 if the People decline a retrial. (Citing *People v. Jaramillo* (1976) 16 Cal.3d 752, 760 (*Jaramillo*).) In *Jaramillo*, it was "not possible under the verdict as rendered to determine which combination of proscribed conduct and intent resulted in the finding of guilt . . . . Indeed, it [was] quite likely that no refined determination was made by the fact finder." (*Id*. at pp. 757-758.) Under those circumstances, the People appropriately were given the option of resubmitting both counts to the fact finder.

Here, in contrast, the verdict as rendered makes it reasonably probable that the finding of guilt resulted from the taking rather than the posttheft driving. We shall reverse count 6, lift the Penal Code section 654 stay on count 5, and remand for resentencing on count 5.

IV

Defendant contends, and the Attorney General concedes, he is entitled to two additional days of presentence custody credit. We accept the Attorney General's concession.[6]

Defendant was arrested on November 9, 2004, and sentenced on November 21, 2005. He is entitled to credit for the date of arrest (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124), the date of sentencing (*People v. Smith* (1989) 211 Cal.App.3d 523, 526), and all days of custody in between. Thus, defendant is

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[6] The *text* of the Attorney General's argument concedes the error. However, the *heading* of the argument erroneously states that defendant "is not entitled to two more days of credit on his sentence."

entitled to 378 days of custody credit, not the 376 days awarded by the trial court. We shall modify the judgment accordingly. This modification does not require an adjustment of the trial court's award of 56 days of presentence conduct credit. (Pen. Code, § 2933.1, subd. (c).)

DISPOSITION

Defendant's count 6 conviction is reversed. The stay of execution of his count 5 sentence is dissolved, and the matter is remanded to the trial court for resentencing on count 5. Defendant is awarded 378 days of custody credit. In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.